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IN THE

Supreme Court of the United States

October Term - 1950

No. 521

ROBERT W. HART and ELLEN BROWN HART, *Petitioners,*

vs.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Robert W. Hart and Ellen Brown Hart, respectfully pray that a writ of certiorari issue to review an order of the United States Court of Appeals for the Fourth Circuit entered November 17, 1950, granting the motion of appellee, United States of America, to dismiss petitioners' appeal from a judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division, entered July 5, 1950, in the action entitled "United States of America, plaintiff, vs. Robert W. Hart and Ellen Brown Hart, defendants."

Opinion Below

The Order of the United States Court of Appeals for the Fourth Circuit entered November 17, 1950 stated:

> "This cause came on to be heard on the motion of the appellee to dismiss the appeal, and was argued by counsel.
> ON CONSIDERATION WHEREOF, it is now here ordered by this Court that the appeal in this cause be, and the same is hereby, dismissed."

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 United States Code, 1254 (1)

Question Presented

Is the "Final Order" entered by the United States District Court for the Eastern District of Virginia an appealable "Final Order"?

Statement of Facts

On June 7, 1949 the United States of America, plaintiff below, filed a complaint against Robert W. Hart and Ellen Brown Hart, defendants below, alleging various violations of the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended, and asked that the defendants be enjoined from further violations of the Acts, that the defendants be required to make restitution to the occupants for alleged overcharges of rents and that the plaintiff be awarded double damages or in the alternative plaintiff be awarded damages in treble the amount of the overcharges.

The defendants on June 27, 1949 filed an answer to plaintiff's motion for a preliminary injunction and thereafter a hearing on the motion for a preliminary injunc-

tion was had and the defendants were ordered on July 25, 1949 to pay into the Registry of the Court all monies in excess of the lawful maximum rents collected by them, as purchase money under certain sales contracts, from the date of the Order. The Order further provided that in the event the defendants failed to comply, the plaintiff might apply to the Court for a preliminary injunction restraining defendants from violating the Housing and Rent Act of 1947, as amended.

The plaintiff filed an amended and supplemental complaint and on July 5, 1949 defendants filed their answer to plaintiff's amended and supplemental complaint and demanded a trial by jury of the issues.

On September 22, 1949 the plaintiff filed a motion requesting the Court to find that defendants were not entitled to a trial by jury, which motion was answered by the defendants on October 10, 1949. This motion came on for hearing and on October 13, 1949 the Court entered a memorandum opinion (86 Fed. Supp. 787) holding in substance that with respect to plaintiff's demand for a mandatory injunction requiring the defendants to make restitution to the occupants of the housing accommodations the question was an equitable one and would be heard by the Court without a jury while as to the demand for damages the question was a legal one involving the wilfulness of the defendants and was, therefore, triable before a jury. The result of this memorandum opinion was a severance of plaintiff's action into an equitable action to be tried by the Court and a legal action to be tried by a jury.

On February 28, 1950 the case came on for hearing before the Trial Judge, sitting without a jury, as to the matter of the mandatory injunction requiring the defendants to make restitution. The basic issue presented to the Court at this trial was whether or not various sales

contracts involving twelve different properties were in fact sales contracts or whether they were leases with options to purchase. The Court on April 25, 1950 entered a memorandum opinion construing the sales contracts as leases with options to purchase and holding that the defendants had violated the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947, as amended, and thereafter on July 5, 1950, and over defendants' objections, entered its Findings of Fact, Conclusions of Law and "Final Order" directing, among other things, that the Clerk of the Court pay to the Treasurer of the United States all funds which the defendants had deposited into the Registry of the Court pending the outcome of this action, that the defendants deliver to the plaintiff, payable to the Treasurer of the United States, an additional sum in the amount of $8,421.50 and that the plaintiff make disbursements of the sums received from the Clerk of the Court and the defendants to numerous persons who are or had been occupants of defendants' housing accommodations and further ordered that costs be assessed against the defendants as taxed by the Clerk on notice.

On November 2, 1950 defendants filed their notice of appeal from the "Final Order" entered as described above and on November 16, 1950 an appeal was docketed in the Circuit Court of Appeals for the Fourth Circuit. Plaintiff filed a motion to dismiss the appeal on the ground that the said "Final Order" was not an appealable order. Answer was made to this motion and after hearing the United States Court of Appeals for the Fourth Circuit on November 17, 1950 entered an order dismissing the appeal. From this order defendants petition this Court for a Writ of Certiorari.

Specification of Error

The Court of Appeals erred in dismissing the defendants' appeal from the "Final Order" entered on the 17th day of November, 1950 by the United States District Court for the Eastern District of Virginia, Alexandria, Virginia.

Reasons Relied on for Allowance of Writ

It is submitted that the Court below erred in holding that the "Final Order" appealed from was not an appealable "Final Order" and in dismissing the appeal for the following reasons:

1. That after a trial before the Court the "Final Order" appealed from determined and disposed of all questions involving the validity of approximately eighteen various sales contracts between the defendants and the purchasers of defendants' properties and all questions concerning payment to defendants by tenants for repairs made to certain of defendants' premises prior to occupancy by tenants.

2. That the defendants demanded a trial by jury of all of the issues and the Trial Judge denied defendants' demand for trial by jury on the question of whether or not the defendants had violated the Housing and Rent Act and granted the demand for trial by jury on the question of whether or not the defendants had wilfully violated the Housing and Rent Act and directed that the trial proceed before the Court on the sole issue of whether or not the defendants had violated the said Act.

3. That after a trial before the District Court on April 25, 1950 the Trial Judge directed counsel for the plaintiff, United States of America, to present proposed Findings of Fact and Conclusions of Law as well as an

appropriate Decree with respect to the questions determined in Paragraph 1 and, notwithstanding objections of counsel for the defendants, the Court on July 5, 1950 directed that the Findings of Fact and Conclusions of Law be filed and made a part of the record and further directed that a "Final Order" be entered directing, among other things:

(a) That the Clerk of the Court deliver to the plaintiff, payable to the Treasurer of the United States, certain funds which the defendants had been ordered by the Court to, and did, deposit with the Registry of the Court.

(b) That the defendants deliver to the plaintiff, payable to the Treasurer of the United States, a certain specified sum, namely $8,421.50.

(c) That the plaintiff make disbursement of the sums received from the Clerk of the Court and the defendants as provided by the "Final Order" of the Court to various persons not parties to this action, and,

(d) That the cost be assessed against the defendants as taxed by the Clerk on notice.

4. That the "Final Order" directed that money be paid to persons who became occupants of defendants' properties after the institution of the instant suit and the particular sales contracts covering their occupancy were not before the Court nor did the Court consider the terms and conditions of these particular contracts before ordering the payment of money to these occupants by the defendants through the plaintiff.

5. That the Trial Court, by ordering a severance of the causes of action for trial, one before the Court and later a retrial before the jury, placed an undue burden upon the defendants in requiring them to carry the burden of disproving wilfulness before the jury while a trial of the

entire case would have required the plaintiff to produce all parties to the contracts to prove its case and thereby would have permitted the defendants to establish their defense in one proceeding as was contemplated by the statute under which the plaintiff proceeded. The Trial Court has ruled that its Findings of Fact are now res judicata and the burden is on the defendants to prove before the jury that the violations determined by the "Final Order" were not wilful.

6. That the Trial Judge ordered the entry of a "Final Order" which "Final Order" was and is enforceable and the Court obviously intended said Order to be final and appealable. While the Trial Judge did not specifically state in said "Final Order" that he saw no just reason for delay in entering the "Final Order", he did direct the entry of a "Final Order". It clearly follows that if the Trial Judge had known of any just reason for delay he would not have directed the entry of a "Final Order."

7. That in the event that the "Final Order" of the Trial Judge, from which an appeal is sought, is reversed the litigation will thereby be completely terminated without the necessity of a long and expensive trial by jury.

8. It is submitted that it is manifestly unjust to subject the defendants to penalties for non-compliance with the "Final Order" without permitting them the right to an immediate appeal or in the alternative, if the defendants comply with the "Final Order," subject them to the impossible task of recovering the money which has been paid out to various persons if the "Final Order" is reversed at some later date. It is further manifestly unjust to place the defendants as well as the plaintiff at the expense and cost of a lengthy jury trial, the necessity of which would be completely obviated should the "Final Order" entered by the Trial Judge be reversed upon review by an appellate Court.

9. Rule 54 (b) as amended December 27, 1946, effective March 19, 1948, unfairly shifts the determination of when to appeal a decision of the Trial Court from the litigants to the Trial Judge. Under a strict interpretation of the rule, by the mere omission of the words "that there is no just reason for delay" in the entry of a "Final Order" the Trial Court can arbitrarily prevent a litigant from an immediate appeal regardless of how harsh or unjust the court's order may be.

10. That the Trial Judge by expressly directing the entry of a "Final Order" substantially met the requirements of Rule 54 (b) and the appellants' appeal should not be dismissed because of the failure of the Trial Judge to insert in the "Final Order" the precise talismanic words of the rule "* * * that there is no just reason for delay * * *" when it is clear that this determination must have been made; otherwise, the Court would not have directed the entry of the "Final Order".

Summary of Argument

The Circuit Court of Appeals for the Fourth Circuit did not set forth its reason for dismissing petitioners' appeal but it is believed by counsel, by reason of discussions at the hearing on the Motion to Dismiss, that the Court was of the opinion that the "Final Order" was not appealable because it did not comply strictly with Rule 54 (b) of the Federal Rules of Civil Procedure. It must be conceded that the Court did enter a "Final Order." However, the Court did not expressly determine in words that there was no just reason for delay in the entry of the "Final Order". The Circuit Court of Appeals for the Fourth Circuit could well have determined that the entry of a "Final Order" by the Trial Judge in and of itself determined that the Trial Judge knew of no just reason for delay.

A strict and literal interpretation of the rule confers the right upon the Trial Judge who has entered a "Final Order" to determine whether or not he desires to have his final and enforceable order reviewed until various and other steps may have been taken in the proceeding. The mere omission from his "Final Order" of the words "I see no just reason for delay" save him from having his order reviewed forthwith by an appellate court regardless of how harsh his "Final Order" may be or how burdensome it is upon the parties directed to obey the order. Indeed, it is believed that only in rare cases will the Trial Judge insert these talismanic words and will relish the thought that he can enter a final and enforceable order without fear of immediate review.

This Court in the case of *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507; 70 Sup. Ct. 322, where the only issue presented was the finality of a judgment for the purpose of appeal, recognized the impossibility of deciding specific words or phrases which could be used to determine the finality of a judgment in every case when it stated "That we cannot devise a form of words that will settle this recurrent problem seems certain; * * *".

One of the purposes of amended Rule 54 (b) is to reduce the danger of hardship and denial of justice through delay of the right to appeal until all subsidiary and collateral issues are determined. In the instant case the "Final Order" not only completely resolves all isues in connection with the equitable action but it also establishes the only basis on which the legal action can proceed. If the decision in the equitable action should ultimately be determined to be erroneous, the basis for the subsequent legal action is lost and no further proceedings are necessary. To require the defendants to stand the expense and inconvenience of a long jury trial until it has been finally

determined that a basis for such trial actually exists would be manifestly unjust.

In the case of *Flegenheimer* v. *Manitoba Sugar Co., Ltd., et al.*, 182 Fed. 2(d) 742, the United States Court of Appeals for the Second Circuit indicated that the appellate court might make the determination as to whether there was cause for delay in entering the "Final Order" if the Trial Judge had failed to expressly determine whether a cause for delay existed or not and it is strongly urged that the appellate court under the facts in this case should have made such a determination.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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January, 1951

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Statutes:

Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, et seq.):

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Housing and Rent Act of 1947, as amended (61 Stat. 193, 50 U. S. C. App. Supp. II, 1881 et seq.):

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 521

ROBERT W. HART AND ELLEN BROWN HART,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither the order of the District Court (R. 30), entered July 5, 1950, nor the order in the Court of Appeals dismissing the appeal (R. 40) has been reported.

JURISDICTION

The order of dismissal of the Court of Appeals was entered on November 17, 1950 (R. 40) and the petition for a writ of certiorari was filed on January 27, 1951. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the "Final Order" of the District Court directing petitioners to make restitution of rental overcharges to various tenants pursuant to Section 205 (a) of the Emergency Price Control Act of 1942 and Section 206 (b) of the Housing and Rent Act of 1947 as amended, is a final, appealable order, where there is still pending for determination in the District Court that portion of the complaint which seeks statutory damages pursuant to Section 205 of the Act of 1947, arising out of the same transactions and involving the same parties.

STATUTES INVOLVED

28 U. S. C., Supp. III, Section 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rules 54 (b) and 62 (h) of the Federal Rules of Civil Procedure (28 U. S. C. foll. 723c), as amended and effective March 19, 1948[1] provide as follows:

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[1] Prior to amendment, Rule 54 (b) provided:

"When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the

RULE 54 (b). *Judgment Upon Multiple Claims.*—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

RULE 62 (h). *Stay of Judgment Upon Multiple Claims.*—When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subse-

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issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party, in whose favor the judgment is entered."

quent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

The pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U. S. C. App. Supp. II, 1881 et seq.) and of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901 et seq.) and other Rules of Civil Procedure are set forth in the Appendix (*infra*, pp. 16–20).

STATEMENT

Petitioners are the owners of housing accommodations in Arlington, Virginia. This action was brought by the Housing Expediter pursuant to the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947, as amended.[2] The complaint as amended by a supplemental complaint sought restitution pursuant to Section 205 of the Price Control Act for overcharges alleged to have been made prior to June 30, 1947 (R. 8–11), restitution and injunctive relief pursuant to Section 206 (b), and statutory damages pursuant to Section 205 of the Housing and Rent Act for overcharges alleged to have been made after June 30, 1947 (R. 11–16). The substance of the complaint was that petitioners had entered into alleged contracts of sale which, in fact, were leases for rentals in excess of the

[2] Hereafter referred to as the Price Control Act and Housing and Rent Act, respectively.

maximum prescribed by the Act and regulations. Petitioners filed a jury demand. Upon respondent's motion, the District Court denied petitioners' demand for a jury trial respecting the claims for restitution and injunctive relief under Section 205 (a) of the Price Control Act and Section 206 (b) of the Housing and Rent Act, but granted the demand for a jury trial to the extent that it related to the claim for multiple statutory damages under Section 205 of the Housing and Rent Act (R. 6, 35) (*United States* v. *Hart,* 86 F. Supp. 787 (E. D. Va.)).

Subsequently, the equitable action was tried to the court without a jury, at the conclusion of which the court issued a memorandum opinion in which it held that the contracts were not valid instruments for the conveyance of real estate but were in reality devices to evade the Act (R. 23). The court thereupon made Findings of Fact in which it held that the so-called sales contracts were not valid (No. 12, R. 27), but were "in actuality leases with an option to purchase which violate Section 825.2 (b) of said Controlled Housing Rent Regulations" (12 F. R. 4331) (No. 13, R. 28).

Upon the basis of this finding, the court, in a document entitled "Final Order" (R. 30–33), ordered restitution of overcharges in a total sum of $8,421.50 to the various tenants therein named, and also ordered funds on deposit in the registry of the District Court paid to the Treasurer of the

United States for distribution to occupants of the housing accommodations, and that other sums be paid into the registry of the court. These provisions of the judgment have not been executed. In addition, the court ordered that (R. 33):

> 14. Plaintiff may proceed in a trial before a jury to a determination of its right to double damages for overcharges collected after April 1, 1949.
>
> 15. Plaintiff's claim for treble damages for overcharges collected prior to April 1, 1949 is dismissed.

On September 2, 1950, petitioners appealed to the Court of Appeals for the Fourth Circuit from the order issued July 5, 1950 (R. 34). Respondent moved to dismiss this appeal on the ground that it was fragmentary and contrary to Rule 54 (b) of the Federal Rules of Civil Procedure (R. 37). On November 17, 1950, the Court of Appeals entered an order dismissing the appeal (R. 40).

ARGUMENT

The sole question presented in this case is whether the court below erred in dismissing the appeal from the order of the District Court directing petitioners to make restitution of rental overcharges. Contrary to petitioners' contention, the court below properly granted respondent's motion to dismiss the appeal upon the ground that the order appealed from was not final.

The action, brought pursuant to the Price Control Act and Housing and Rent Act, sought the following relief: first, restitution of rental overcharges made prior to June 30, 1947 pursuant to Section 205 (a) of the Price Control Act; second, injunctive relief and restitution pursuant to Section 206 (b) of the Housing and Rent Act for rental overcharges collected after June 30, 1947, and, third, statutory damages pursuant to Section 205 of the Housing and Rent Act covering rental overcharges collected after June 30, 1947.

The order appealed from granted relief solely for restitution under Section 205 (a) of the Price Control Act and Section 206 (b) of the Housing and Rent Act; it expressly reserved for future decision by a jury the question whether respondent was also entitled to double statutory damages; and it dismissed respondent's claim for treble damages for overcharges collected prior to April 1, 1949 (R. 30). Only if this order was a final decision, did the court below have appellate jurisdiction to review it. *Reeves* v. *Beardall*, 316 U. S. 283; *Arnold etc.* v. *United States for Use of W. B. Guimarin & Co.*, 263 U. S. 427; 28 U. S. C. 1291 *supra*, p. 2. Rule 54 (b) of the Federal Rules of Civil Procedure, as amended (*supra*, p. 3) provides for the entry of separate judgments upon one or more of multiple claims where the claims are entirely distinct. But "that rule left undisturbed the general rule that, absent special statutory authorization, only final judg-

ments are appealable. Moore, Federal Practice (Supp. 1948) 172 et seq." *Creel* v. *Creel,* 184 F. 2d 449, 452 (C. A. D. C.). See too, *Garbose* v. *George A Giles Co.,* 183 F. 2d 513, 514–515 (C. A. 1st).

In the *Reeves* case, *supra,* the test was laid down by which to determine whether a judgment upon one or more of multiple claims under Rule 54 (b) is final for purposes of appeal under Section 128 of the Judicial Code, 28 U. S. C. Section 225 (now 28 U. S. C. 1291) as follows: "The Rules make it clear that it is 'differing occurrences or transactions, which form the basis of separate units of judicial action' ", and "If a judgment has been entered which terminates the action with respect to such a claim, it is final for purposes of appeal under § 128 of the Judicial Code" (316 U. S. at p. 285–286). In the *Reeves* case, the judgment met the test and was final for purposes of appeal, because one claim in the action (on a promissory note) "was *unrelated*" to the other claim (contract not to change the will), and also because "Those two claims arose out of *wholly separate* and distinct transactions or engagements" (316 U. S. at 286). [Emphasis added.]

Applying the test laid down in the *Reeves* case, it is clear that the order entered by the District Court granting restitution under Section 205 (a) of the Price Control Act and Section 206 (b) of the Housing and Rent Act does not meet the

prerequisites of finality for purposes of appeal. The right of the Housing Expediter to statutory damages under Section 205 of the Housing and Rent Act and to restitution under that Act and its predecessor unmistakably relate to a single claim, which is that the petitioners charged certain tenants more than the lawful rental. Both remedies rest upon identical facts and transactions and to some extent even cover the same period of violation. The two principal distinctions between these remedies are, first, that the restitution order makes the award available to the tenants from whom the overcharges have been wrongfully taken, while under the judgment for statutory damages, still to be determined by the jury, the damages are paid to the Government, and, second, that an overcharge in good faith constitutes no defense to restitution, but a defendant may mitigate damages in an action under Section 205 for statutory damages by showing that he exercised practicable precautions to avert the wrong and that his conduct was free from wilfulness. (*Infra,* p. 16.) In sum, therefore, what there is before the court are two remedies complementing each other which relate to the *same* claim (cf. *Porter* v. *Warner Holding Co.,* 328 U. S. 395).

If appeal were open, as petitioners assert, from the order granting restitution, and the order affirmed, it would not end the litigation on the other portion of the single claim involved in the

case. If thereafter the jury brought in a verdict for double damages, petitioners' second appeal from a judgment adopting this verdict would bring up once again for consideration, not "differing occurrences or transactions" (cf. *Reeves* v. *Beardall, supra*) but precisely the same "occurrences or transactions" presented on the first appeal, adding only the element of petitioners' good faith and freedom from willfulness. And presumably, if petitioners' contention is correct, respondent could assert by another separate appeal the argument that the District Court erred in dismissing plaintiff's portion of the claim for overcharges collected prior to April 1, 1949 (R. 33). Thus it would require three piecemeal appeals with all attendant costs and delay to determine what could be settled far more easily by one appeal. In this respect, the case is no different than those in which a defendant raises different defenses to the same claim (cf. *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.*, 154 F. 2d 814 (C. A. 2d)), certiorari denied 328 U. S. 859. As was said by Judge Clark speaking for the Court in *Petrol Corp.* v. *Petroleum Heat & Power Co.*, 162 F. 2d 327, 329 (C. A. 2d):

> As has often been pointed out, the rules stress the "transaction or occurrence" as the "subject matter" of a claim, rather than the legal rights arising therefrom. F. R. C. P., Rule 54 (b); *Reeves* v. *Bear-*

> *dall,* 316 U. S. 283, 285, 62 S. Ct. 1085, 86 L. Ed. 1478. * * * Hence the mere fact that different claims are made arising out of this one contractual provision is not sufficient separation of the "causes" so that piecemeal appeal is permissible. * * * The matter is of course made quite clear by the amendment to F. R. C. P., Rule 54 (b), adopted by the Supreme Court and soon to become effective. See Advisory Committee's Note to F. R. 54 (b) in its Report of June, 1946, pp. 70–72; Ilsen, Federal Rules of Civil Procedure with Approved Amendments, Rev. Ed. 1947, 439; 56 Yale L. J. 141; 47 Col. L. Rev. 239.

From the foregoing, it is clear that the order entered by the District Court was not a final decision under 28 U. S. C. Sec. 1291 as to be appealable.

2. There is still another reason why the order entered by the District Court did not in any event fall within Rule 54 (b) as amended (*supra,* p. 3). The Rule, as amended, permits a court to direct the entry of a final judgment upon less than all of the claims, but "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." The Rule, as amended, further expressly provides that "in the absence of such determination and direction any order or other form of decision, however designated, which ad-

judicates less than all the claims, shall not terminate the action as to any of the claims * * *."

In the instant case neither condition for invoking Rule 54 (b) was contained in the order complained of. There is absent both the "express determination that there is no just reason for delay" and likewise "an express direction for the entry of judgment." "Under this Rule it seems clear that the judgment is interlocutory since the Court made no 'express determination' and 'express direction' as required to make the judgment final" (*Flegenheimer* v. *Manitoba Sugar Co.*, 182 F. 2d 742, 743 (C. A. 2d)); see too, *Kam Koon Wan* v. *E. E. Black, Limited,* 182 F. 2d 146, 148 (C. A. 9th). And in one case where the District Court did direct the entry of final judgment, Rule 54 (b), as amended, was nevertheless held to be inapplicable because "he did not, in addition, make any 'express determination that there is no just reason for delay'" (*Garbose* v. *George A. Giles Co., supra,* 183 F. 2d at p. 515). Accordingly, it cannot be said that the order "however designated * * * terminate[s] the action as to any of the claims," even if more than one claim is present in the case (*Robinson Brothers & Co.* v. *Tygart Steel Products Co.,* 184 F. 2d 534 (C. A. 3); *Flegenheimer* v. *Manitoba Co., supra; Kam Koon Wan* v. *E. E. Black, Limited, supra; Winsor* v. *Daumit,* 179 F. 2d 475, 477 (C. A. 7); *Etten* v. *Kauffman,* 179 F. 2d 302 (C. A. 3)).

In addition, the District Court did not direct the entry of judgment, and there is no notation of a judgment in the civil docket as provided by Rule 79 (a) of the Rules of Civil Procedure (*infra*, p. 19). There is thus no effective entry of judgment at all (Rule 58, Federal Rules of Civil Procedure, *infra*, p. 18; *Kam Koon Wan* v. *E. E. Black, Limited, supra*, 182 F. 2d at 148). Moreover, the court reserved for consideration by the jury the determination whether petitioners acted wilfully and exercised practicable precautions to avert the wrong as to entitle petitioners to mitigate damages under Section 205 of the Act.

3. Reliance upon *Dickinson* v. *Petroleum Conversion Corporation*, 338 U. S. 507 is misplaced. In the first place, that decision construed an order entered before the amendment to Rule 54 (b), and this Court expressly disavowed any intention to lay down any principles "to embrace any case but this" (338 U. S. at p. 512). In addition, the decree involved in the *Dickinson* case was final and complete respecting respondent's rights, because what remained in the case was of no further concern to it but only to other parties.

Unlike the *Dickinson* case, the questions that remain in this case, and the manner in which they are resolved, will affect only petitioners, are solely of concern to them, and to no one else; and the determination of these questions rests upon what

testimony petitioners will give and what weight will be attached to their testimony by the jury. Thus, unlike the decree in the *Dickinson* case, here, the decree involved herein is tentative, informal and incomplete. Nor does the case of *Flegenheimer* v. *Manitoba Sugar Co., supra,* support the petitioners' argument since the court held that the order in the court below in that case was interlocutory and not appealable.

4. Equally lacking in merit is petitioners' contention that they would be subject "to the impossible task of recovering the money which has been paid out to various persons if the 'Final Order' is reversed at some later date" (Br. 7). Since it was respondent's position in the court below and in this Court that the order of July 5, 1950 was not final, no attempt has been made to execute the judgment. In any event, had the petitioners believed that the order entered on July 5, 1950 was truly a final order, they could have protected themselves against its execution by petitioning the court to invoke Rule 62 (h) for the purpose of staying the "enforcement of that judgment until the entering of a subsequent judgment * * *." This they have done.

CONCLUSION

The decision of the court below is clearly right and does not involve any question of substantial merit. There is no conflict of decisions and further review is not warranted. The petition

for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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FEBRUARY 1951.

APPENDIX

THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED (50 U. S. C. APP. SEC. 901 ET SEQ.)

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

THE HOUSING AND RENT ACT OF 1947, AS AMENDED (50 U. S. C. APP. 1881 ET SEQ.)

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) $50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, ac-

cepted, or received, whichever in either case may be the greater amount: *Provided,* That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither wil'ful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided,* That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period. If such action is instituted, the person from whom such payment is demanded, accepted, or received shall thereafter be barred from bringing an action for the same violation or violations. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant

on account of any violation with respect to the same person prior to the institution of the action in which such judgment was rendered.

SEC. 206. (a) It shall be unlawful for any person to demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204, or otherwise to do or omit to do any act, in violation of this Act, or of any regulation or order or requirement under this Act, or to offer, solicit, attempt, or agree to do any of the foregoing.

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 58. ENTRY OF JUDGMENT.—Unless the court otherwise directs, and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant

to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

RULE 79. BOOKS KEPT BY THE CLERK AND ENTRIES THEREIN.—(a) *Civil Docket.*—The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution

of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) *Civil Judgments and Orders.*—The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

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